

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2504

THOMAS MEISSGEIER, PETITIONER,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before LANCE, *Judge*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On July 21, 2016, the petitioner, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus. In it, he asks the Court to order the Secretary to "eliminate delays in processing appeals" and "hold unconstitutional under the Due Process Clause of the Fifth Amendment to the Constitution any statute, regulation or practice that interferes with prompt and speedy appeals." Petition (Pet.) at 19. On July 27, 2016, the petitioner filed an opposed motion to consolidate his case with 16 other cases. The Court denied the motion on September 14, 2016. On September 23, 2016, and October 8, 2016, the Court ordered the petitioner to amend his petition to provide sufficient facts and supporting documentation for the Court to determine whether a writ is warranted.

On September 26, 2016, the petitioner responded to the Court's September 23, 2016, order. In his response, he asserts that he filed a claim for entitlement to service connection for sleep apnea on May 20, 2013, that VA denied his claim on November 13, 2014, and that he filed a Notice of Disagreement on January 6, 2015. Amended Pet. at 5. He contends that he has "heard nothing since" he perfected his appeal on November 9, 2015, following VA's issuance of a Statement of the Case (SOC) on March 25, 2015. *Id.*

On October 24, 2016, the petitioner submitted evidence supporting his contentions. *See* Petitioner's Oct. 24, 2016, Response (Resp.), exhibits (exs.) C-T. He argues that he "will wait an average of 537 days" for the Board of Veterans' Appeals to receive his appeal, Resp. at 1, and further asserts that he sent emails to VA on October 20, 2015, and November 6, 2015, but has received no replies, *id.* at 27. The petitioner contends that he "can expect that his [Substantive Appeal] will not even be 'worked' until approximately five to six years from now." *Id.* at 18.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before the Court may issue a writ: (1) The petitioner must demonstrate a lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

When delay is alleged as the basis for a petition, a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act. *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order).

Here, the Court is not convinced that the issuance of a writ is warranted. Specifically, the petitioner has not demonstrated that the year since he filed a Substantive Appeal constitutes a delay "so extraordinary . . . that it is equivalent to an arbitrary refusal by the Secretary to act." *Id.* Rather, his argument is based on the prospective *possibility* of a delay of five to six years—a delay that has not yet occurred. The Court holds that the potential for further delay is not sufficient justification for the issuance of a writ, and it will, accordingly, deny the petition.

Upon consideration of the foregoing, it is

ORDERED that the petition is DENIED.

DATED: November 30, 2016

BY THE COURT:

A handwritten signature in blue ink that reads "Alan G. Lance". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

ALAN G. LANCE, SR.

Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)